IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

MONDAY, THE 19TH NOVEMBER 2007 / 28TH KARTHIKA 1929

WP(C).No. 33465 of 2007(H)

CMA.6/2007 of DISTRICT COURT, THODUPUZHA
IA 646 & 647/06 in OS.89/2003 of MUNSIFF COURT, DEVICOLAM

.....

PETITIONER:

MANJU M.LAL, W/O LATE MANOHARLAL,
VAISAGHAM HOUSE, MAMAM KARA,
ATTINGAL VILLAGE, THIRUVANANTHAPURAM.

BY ADV. SRI.P.B.SAHASRANAMAN
SRI.K.JAGADEESH
SRI.T.S.HARIKUMAR

RESPONDENT:

VANAJA.J., W/O SIVARAJAN,
POURNAMI HOUSE, KARITHOTTA MURI,
KULANADA VILLAGE, KOZHENCHERI TALUK,
PATHANAMTHITTA DISTRICT.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 19/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.N.Krishnan, J.

==========

W.P(C).No.33465 of 2007

==========

Dated this the 19th day of November, 2007.

JUDGMENT

This Writ Petition is filed by the legal representative of the deceased sixth defendant against the order of the District Judge, Thodupuzha in C.M.A.No.6 of 2007. The sixth defendant died during the pendency of the suit. He had remained ex parte. It is seen from the order in the C.M.Application that when an application was filed to implead the legal representative the court closed it under Order 22 Rule 4 and held that the sixth defendant was ex parte. I feel that even the said order is totally erroneous because in a suit for partition unless the legal representative is on the party array, there cannot be a valid decree.

2. It is true that Order 9 Rule 13 of C.P.C. only envisages a situation for setting aside an ex parte decree by a defendant in the proceeding. In the decision reported in **Santhosh** v. **Teja Singh** - A.I.R. 1977 Delhi 110, the Delhi High has taken the view that "A person who is not a party, though he may be interested in the suit is not entitled to apply under this Rule." A reading of Order 9 Rule 13 of C.P.C. also would envisage such a situation that it is only the defendant, who can apply for setting aside the ex parte decree.

3. Therefore, since the present writ petitioner was not a defendant in the suit, Order 9 Rule 13 of C.P.C. may not apply

and his remedy may be to prefer an appeal against the said decree. But without declaration of the shares of all the parties, a decree for partition may not have real sanctity. Since he had come before the court and the court on technical questions did not implead him one cannot say that the decree can be so binding on him. But I make it clear that the remedy for the party is to file an appeal before the appropriate court and the appropriate court shall consider the impact of the proceedings. It is seen that the petitioner has not been negligent and therefore when such an appeal is filed with a petition to condone the delay seeking permission to file the appeal, it shall be entertained by the court and disposed of in accordance with law. In order to enable the party to move for appropriate relief, I direct the court below not to pass final decree for two months.

Writ Petition is disposed of accordingly.

M.N.Krishnan,
Judge.

ess 19/11